if I remit the case to the learned District Judge for further hearing and reconsideration on the basis:—

(a) that the Order to pay £20 per month cannot be questioned by him;

(b) that he must enforce the order as a whole or not at all;

(c) that even inability to pay is not a decisive factor though it is one to be taken into consideration before ordering imprisonment; and that inability to pay is less decisive in considering whether other methods of enforcement authorised by section 279 of the Criminal Procedure Code (Chapter 21) should be applied.

On the re-hearing the learned District Judge, will take into consideration such further evidence of the defendant's means as may be adduced before him.

In this connection I would refer to a remark made by Mr. Davies before me that the defendant had taken out an education policy. I have not seen that policy. If the point is made before the learned District Judge, he will consider whether the purpose in taking out the policy was wholly or in part to render the defendant unable to obey the order, and also who gets the benefit of the policy should the children die before it matures.

I direct that the case be remitted to the District Judge for further hearing and consideration.

Solicitors for the Appellant—
Allen & Gledhill.

Solicitors for the Respondent—
Aubrey Davies & Co.

[COURT OF CRIMINAL APPEAL]

McELWAINE, C.J., HALL, C.J. (F.M.S.) & TERRELL, J.

March 14, 1938.

YEO HOCK CHENG v. REX.

[SINGAPORE ASSIZE CASE No. 1 of 1938].

[CRIMINAL APPEAL No. 5 of 1938].

Evidence—statements alleged to have been made by a person since deceased—admissibility—Evidence Ordinance (Cap. 13), S. 32 (1).

The appellant was convicted of the murder of a Chinese girl Low Koh before Horne, J. and a special jury. At the trial two statements alleged to have been made by the deceased to her father and to her sister respectively, on different dates before her death, were admitted in evidence. The statement to her father was to the effect that she had denied sleeping at the appellant's house on a specified date because the appellant had threatened to, kill her if she told; and the statement to her sister was that she was going out with the appellant and that he had told her to wear man's clothing. The appellant appealed to the Court of Criminal Appeal.

Held on appeal, that the first statement could not be admitted under Section 32 (1) of the Evidence Ordinance in that the alleged threat contained in the statement was too remote and could not properly be treated as one of the circumstances of the transaction resulting in the accused's death.

Held further (McElwaine, C.J., dissenting), that the second statement was admissible in evidence on the ground that the arrangement made by the appellant for the deceased to go out with him and to wear man's clothing, presumably to avoid recognition, was a circumstance of the transaction which resulted in the deceased's death.

CRIMINAL APPEAL.

The grounds of appeal and the facts of the case appear sufficiently from the judgments below.

Tampoe-Phillips, for the Appellant.

Storr, Crown Counsel, for the Crown.

Cur. Ad. Vult.

McELWAINE, C.J.—The appellant was tried before Horne J. and a special Jury at Singapore Assize and convicted on 9th February 1938 of the murder on 14th March 1937 of a Chinese girl named Loh Koh.

He filed a petition of appeal on 12th February 1938 in which he set out the grounds of appeal as:

1. I am not satisfied with the judgment.
2. The sentence is against the weight of evidence.

On 15th February the trial Judge gave a certificate under paragraph (b) of Section 5 of the Court of Criminal Appeal Ordinance (Chapter 11) upon the following grounds:—

1. That it is questionable whether the evidence of statements alleged to have been made by the deceased:
   (a) on or about 3rd March, eleven days before her death to her father Low Kim Song;
   (b) on the evening of her death to her sister Low Seok Ngim
   are admissible under Section 32 (1) of the Evidence Ordinance (Chapter 13).
2. That it is questionable whether the evidence as a whole is not sufficient to justify the jury in giving a verdict of murder as there was no direct evidence as to the cause of death.

The Court assigned counsel to argue the appeal on behalf of the appellant and on 25th February he filed additional grounds of appeal. The first additional ground was shortly: That at the close of the prosecution there was no evidence

that the accused committed the offence and that the Judge ought to have directed the jury to return a verdict of not guilty.

If this means that the accused in his evidence established the Crown case, the point is bad. *Rex* v. *Power*, (1919) 1 K.B. 572. But in our opinion a case had been made out before the accused entered upon his defence. The evidence was purely circumstantial but we consider that a jury could convict upon it. This disposes of the Appellant's own ground of appeal and of the second ground in the trial Judge's certificate as well as the first ground in the additional grounds of appeal.

The second additional ground of appeal was that two documents (a) a letter purporting to have been written and signed by the deceased and which was received by the police through the post on the 15th March, 1937; (the postmark was "Singapore 11.30 a.m., 15th March, 1937") and (b) a letter dated 2nd September, 1937 purporting to be signed "Ahmat," were wrongly admitted; also that the statements referred to in the first paragraph of the trial Judge's certificate were wrongly admitted in evidence.

The objection raised to the two letters was that they were confessions, the first addressed to the police and so inadmissible; the second addressed to a magistrate and written in custody and so inadmissible.

The first letter purported to be written by the deceased girl to the Inspector in charge, Paya Lebar Police Station, informing him that her father was forcing her to marry Cheng (the Appellant) and that she was going off with Ahmat to another country to live with him as husband and wife. We see nothing in the nature of a confession in this letter. *Ex hypothesi* the girl was alive, there was no suggestion that she was murdered by any one. Even if it was a confession, it was made before a police investigation began, so it was not ruled out by Section 124 of the Criminal Procedure Code: nor was any person accused on 15th March, so, were it not for *Lim Chin* v. *P.P.*, (1924) 5 F.M.S.L.R. 104 I would have thought that it is not excluded by Section 25 of the Evidence Ordinance. Any way, it is not a confession. The second letter dated 2nd September, 1937 addressed to a Magistrate and purporting to be signed "Ahmat" stated that the writer had for reasons given killed the girl at Tampenis River. It concluded "I am sending this to say very sorry for Chen was catch."

These letters were put in evidence with a view to their being proved to have been written by the appellant, and a handwriting expert gave evidence that they were written by him. The deceased could not read or write English. Mr. Tampoe Phillips argued that the second letter was a confession by the appellant and he referred to Section 17 (2) of the Evidence Ordinance.

In our opinion a letter implying that the writer and not the accused was guilty of murder is not a confession by the accused even if it is proved that the accused was the actual writer. The letter was a clear statement that appellant did not commit the murder, and it does not become a confession by proving that the appellant wrote it.

Then it was argued that that being a confession, it was excluded by Section 26 of the Evidence Ordinance which excludes confessions made by a person in police custody unless made in the presence of a Magistrate. If it was a confession, it was made by a person in prison and not in police custody and is not excluded by section 26. See *The King* v. *Tara Singh*, 2 Malayan Law Journal, 40 and note at page 41; (1933) S.S.L.R., 533; *Rasiah* v. *Public Prosecutor*, (1931-2)F.M.S.L.R., 45; *Rex* v. *Wong Ah Kim*, (1935) S.S.L.R. 186, 4 M.L.J., 169.

The letters were put in evidence not as confessions but as evidence of conduct under Section 8 of the Evidence Ordinance, showing that the appellant "provided evidence which would tend to give to the facts of the case an appearance favourable to himself." See Illustration. (e) That was the way in which the letters were used and that was a legitimate use and so long as they are put to the jury in a proper manner, it matters not, even if another inference prejudicial to the accused could be drawn from them so long as the jury is warned to disregard the improper inference. No improper inference could be drawn from these letters. This point may be illustrated by the cases where evidence of other offences may be given to prove system or rebut accident. The evidence is not excluded just because it shews the accused to be of bad character. If it is relevant it is admissible. The objection to the letters therefore fails. The specimen letter written by the appellant at the request of the police after his arrest in order to secure a specimen of his handwriting was also clearly admissible. *Rex* v. *Pallak Nath Singh*, (1933) S.S.L.R., 50, 2 M.L.J., 94.

Leaving for the moment the two statements which form part of the second additional grounds of appeal and passing to the third additional ground which was that the Judge erred in law in making an adverse comment on the fact that the accused failed to state his defence (which was an *alibi*) wholly or in part at the preliminary enquiry. The trial Judge in the course of his charge to the jury after giving the substance of the defence proceeded "It is always an advantage to an accused if he produces an *alibi* at the earliest

possible moment." The Judge continued "until he came to this Court yesterday he never said anything of the kind."

Mr. Tan (who appears to have conducted the defence with marked ability) then drew the Judge's attention to the last page of the depositions. The Judge in consequence told the jury that the accused did say at the preliminary enquiry that he had an *alibi* and that he named two witnesses. It is not a full disclosure but it is a partial disclosure. It was a bare statement that there was an *alibi*.

We consider that a Judge may properly tell a jury that an *alibi* (or any other defence) is more weighty if it is disclosed at once. *Rex* v. *Littleboy* 24 Cr. App. R. 192; (1934) 2 K.B. 408. *Kops* v. *The Queen* (1894) A.C. 650.

The Judge clearly left the *alibi* to the jury: "the burden of proof is upon the Crown, and it may be that the evidence of the *alibi* may leave you to doubt the evidence of the Crown, that is, to have a reasonable doubt about it."

This ground therefore fails. So far the Court is agreed.

I now come to the objection in the second additional ground of appeal—that raised in the trial Judge's certificate—that the statements alleged to have been made by the deceased on the 3rd March (I think the date was really the 5th of March) and on the 14th March were not admissible under Section 32 of the Evidence Ordinance.

The Court is unanimously of opinion that the statement of the 5th of March was inadmissible, but for different reasons. The majority of the Court disagrees with the interpretation I place upon Section 32 of the Evidence Ordinance. What follows, is, so far as it relates to the narrower construction I place on Section 32, the view of a minority so, of course, the contrary view of the majority must prevail.

The general rule of English law is that hearsay is inadmissible. That rule is subject to very limited exceptions, which may be divided into two classes:

(1) When the hearsay is admissible as evidence of the truth of the subject matter of the hearsay.

(2) When the hearsay is admissible to prove that something was said which may account for or explain something done by a person in consequence of his having heard or been told something. In this case the hearsay is admissible as part of the *res gestæ* it is not admitted as evidence that what was heard is true.

The first class is dealt with in Section 32 of the Evidence Ordinance, a section which, with two exceptions, accords with what I understand the English law to be.

That section opens with a general paragraph applicable to each of the eight subparagraphs which follow it:

> "Statements, written or verbal, of relevant facts made by a person who is dead..... are themselves relevant facts in the following cases:—
>
> (i) When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question."

The first point of difference from English law is that this statement is admissible in England only in cases of murder and manslaughter, whereas in this Colony it is admissible in any case in which the death of the maker of the statement is in question. The second point of difference is that in England the person who makes the statement must be in expectation of death with no hope of recovery while in the Colony he need be under no such expectation. The basic law of this Colony is the English common law. That law is varied by local legislation and while full effect must be given to such local legislation there is, in my opinion, no presumption that the common law is varied further than the words of the local legislation necessarily imply.

"The general rule in exposition of all Acts of Parliament is this, that in all doubtful matters, and where the expression is in general terms, they are to receive such a construction as may be agreeable to the rules of common law in cases of that nature; for statutes are not presumed to make any alteration in the common law, further or otherwise than the Act does expressly declare." *Arthur* v. *Bokesham*, 11 Mod. at page 150. "It must be remembered that it is a sound rule to construe a statute in conformity with the common law, rather than against it, except where or so far as the statute is plainly intended to alter the course of the common law" *per* Byles J. in *The Queen* v. *Morris*, L.R.I. C.C.R. at p. 95.

In his dissenting judgment in *The Queen* v. *Scott*, 25 L.J.M.C. at p. 133 Coleridge J. said "How, then, upon general principles are we to proceed in a seeming conflict between the common law and these provisions of the statute? Not, I apprehend, by assuming at once that there is a real conflict, and sacrificing the common law, but by carefully examining whether the two may not be reconciled, and full effect be given to both."

The question was whether an answer given under compulsion of law by a bankrupt could be used against him in a criminal prosecution. I do not gather that the majority of the Court dissented from the statement I have quoted from Coleridge J. They do not appear to have thought that a conflict arose in the case.

Nor do I overlook the speech of Lord Herschell in *Bank of England* v. *Vajliano*, (1891) A.C. at p. 144-5. Having expressed his view that the previous law should not be considered in interpreting section 7 (3) of the Bills of Exchange Act 1882 he proceeded "I am of course far from asserting that resort may never be had to the previous state of the law for the purpose of aiding in the construction of the code. If, for example, a provision be of doubtful import, such resort would be perfectly legitimate."

I think the concluding words of section 32 (i) "such statements are relevant whether the person who made them was or was not at the time when they were made under expectation of death" make it more than doubtful whether the earlier words bear the wide interpretation given them by my brethren. This passage is totally redundant if the earlier words open the floodgates of hearsay as widely as those who differ from me think.

Statements relating to the cause of the speaker's death are commonly called "dying declarations."* In England these statements are admitted in evidence when made by a person who is dying because of something which has happened to him and when the statement is as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death. The person must have no hope of recovery, the belief in the imminence of death giving the sanctity of an oath to the statement. The Evidence Ordinance lets the evidence in though there is no such belief. The difference as I see it is analogous to that which exists between proving a matter by sworn evidence and proving it by unsworn evidence, and that is the extent of the difference on this point between English law and that of the Colony. At common law the statement as to cause of death is the statement of the person dying from that cause and believing he is so dying, so under the Colony Evidence Ordinance the statement as to cause of death is the statement of the person dying from that cause, whether or not he believes in the imminence of his dissolution. In each case it is the statement of a dying person.

If this is not the extent to which our law has been changed from what it was before 1893, the paragraph "Such statements are relevant whether the person who made them was or was not at the time when they were made under expectation of death," which is part of sub-paragraph (i), would be otiose. The Colony law enlarges the occasions under which hearsay as to cause of death or circumstances of the transaction may be admitted, to the extent set out in that paragraph and no further. See too *Haji Salleh* v. *Public Prosecutor*, (1932) F.M.S.L.R., 229.

It follows from this reasoning that a statement made by a person before he met with the mishap which caused his death is not within sub-paragraph (i) of section 32 and is not admissible under this provision. The second class is dealt with in section 14 of the Evidence Ordinance, and Crown Counsel argued that statements of the deceased were admissible under this head as well as under Section 32. In my opinion that is not so. What may be proved under Section 14 is facts. That the girl made a statement before she left the house is a fact that may be proved, but what she said may not be proved for the purpose of leading a jury to believe that what she said was true. If the Crown's argument is correct, Section 32 paragraph (i) would be unnecessary, for this paragraph certainly deals with *res gestae*. It differs from Section 14 by allowing the matter to be proved by hearsay.

There are cases in England which it is difficult to reconcile, but *Regina* v. *Wainwright*, 13 Cox C.C., 171, *Regina* v. *Pook*, *id.*, *Regina* v. *Gloster*, 16 Cox C.C. 471 and *Rex* v. *Thompson*, (1912) 3 K.B., 19 seems to me safer cases to follow than *Regina* v. *Edwards*, 12 Cox C.C., 230.

If a complaint made very shortly after a rape " is clearly not admissible as evidence of the facts complained of" *Regina* v. *Lillyman*, (1896) 2 Q.B., 167, I fail to see how a statement by the girl before the rape that she was going out with the accused would be evidence that she went out with the accused. That fact she would have to prove by her own direct testimony or by the testimony of eye-witnesses.

Similarly, I do not see how a statement by the girl in this case of what the accused is alleged to have said on a former occasion, or of the clothing the accused is alleged to have told her to wear on the night of her murder is admissible in evidence, the accused not having been present at the making of either statement. Nor do I see how what the girl said as to where she was going is part of the *res gestae*.

It may be evidence of her state of mind, of her intention, but neither her state of mind nor her intention is relevant to the issue—who killed her? though they might be relevant if she were charged with attempted suicide.

In my opinion therefore neither the statement alleged to have been made about 8 p.m. on

* Illustration (J) and (K) to sec. 8 of the Evidence Ordinance speks of "a dying declaration under sec. 32 (1)".

the 14th March, 1937 by the deceased to Low Soo Ngim that she was going out with the accused and that he had told her to wear man's clothing, nor the statement alleged to have been made on the 5th March to her father that she had denied sleeping at the accused's house on 28th February because the accused had threatened to kill her if she told, was admissible in evidence. As to this last statement I may add that even if such a statement were admissible it is by no means clear from the evidence that it ever was made. Low Kim Song, in reply to the question "why did not she admit on the 3rd when you first asked her?," replied "Because the accused told her not to let me know about it. If I should come to know about it, then he would kill her." The witness did not say that it was the deceased who had told him this. In any case after the suggested conversation the marriage was arranged.

But because these statements were, in my opinion, wrongly admitted, it does not follow that the conviction must be quashed. Evidence Ordinance (Chapter 13) Section 168, Court of Criminal Appeal Ordinance (Chapter 11) Section 6 (1) proviso.

The first of the statements—that of the alleged threat to kill—does not seem very material. The jury was entitled to draw an inference from the accused's own evidence that on 3rd March 1937 while she was being beaten by her father the deceased was anxious to appease the accused.

The girl, according to the accused, told him in the hearing of her father that she had not told her father that she had spent the night of 28th February with accused.

Why should she make this remarkable statement? Was she frightened because she feared the accused would think she had confessed? If so, why was she frightened?

This point in the accused's own evidence seem to me more damaging than the statement of 5th March which I think should not have been admitted.

What does the second statement, which I think inadmissible, add to the case? The sister saw the girl go out dressed in white trousers and a yellow upper garment which was not the usual way in which she dressed when going out, but there was no suggestion that these garments did not belong to the deceased.

This sister swears that on the 15th she called the accused to her house and asked him "My sister went out with you, where is she now?" to which accused replied that he did not know. The accused in cross-examination was asked "Did you hear Low Soo Ngim, her sister, say that she asked you where she was?" "She did ask me.. ....a few days before I was arrested.....Low Soo Ngim.....was telling me to come to her, so I ran up to the place. She asked me did I see her sister anywhere? I said I did not know."

The difference between these two versions is that the sister's assertion "my sister went out with you" was not put to the accused. The sister obviously thought deceased most likely to have gone with her fiancee. "I thought she had gone to Cheng's (accused). Nobody else could take her out."

Then the inadmissible evidence goes on that the accused had told her to dress as she did. The Judge warned the jury to disregard this part of the deceased's alleged remark "as it could have nothing to do with the case." I am not sure that an adverse inference could not be drawn from a statement that "accused told her not to put on Shanghai clothing, but man's clothing in order not to let people know she was going out" but the Crown Counsel did not ask the jury to draw this inference and the Judge, as I have said, told the jury to disregard that part of the alleged statement.

The jury was certainly not asked to consider whether the accused told the girl to dress like that in order to facilitate her murder.

The real importance of Low Soo Ngim's evidence lies in what she saw, not what she heard. She saw deceased go out in the unusual going-out attire of white trousers and yellow upper garment and the importance of this is that it affords strong corroboration to the evidence of Koh Teh Tee that it was on the night of the 14th March and not on an earlier night that he saw the accused and the deceased out together. He remarked on the girl's yellow coat and white trousers. The accused, who lived forty yards from the deceased, denied that he saw her on the 14th March. He was rather vague as to when he last saw the girl whom he was to marry. He said "few days after the 4th of March." He said he did not go to her house after that day.

The defence was that he was at South Bridge Road at the time Lo Koh met her death, having left the Tampenis district between 5 and 6 p.m. The jury had ample grounds for disbelieving the *alibi*. Apart from Koh Teh Tee, Ang Kek Kua saw him after 5 o'clock. Tan Boon Teck saw him a little after 7 o'clock behind the market near the 6th Mile stone Tampenis Road. A nearby shop had lit up.

There was sufficient evidence that accused was the last person seen with deceased and that deceased's body was found a mile from the place where she and accused were met by Koh Teh Tee.

There is a difficulty in the time element. Koh Teh Tee is precise that he met them at 9 o'clock. He was on his way to a coffee shop about a

thousand paces away and he reached it at 9.15. Lim Mong Kim, the prawn fisher, was fishing in the Tampenis River on the evening of 14th March from about 6 p.m. until after 8 p.m. He saw lying near the river—"a person without clothes or trousers." He gave no indication of sex or age. He says he did not go up to inspect it but he appears to have known that it was a corpse. This witness says it was 9 o'clock by his clock when he reached his house quarter of a mile away. If this witness's times are correct he saw the corpse at about quarter to 9, quarter of an hour before Koh Teh Tee saw the girl a mile from the spot where the corpse was seen by Lim Mong Kim.

It was between 8 and 8.15 that deceased left her father's house that evening.

This discrepancy in the time element was stressed by Mr. C. C. Tan, the able counsel for the defence. It might have been more emphasised in the summing up, but the Judge did mention that Koh Teh Tee saw the pair at 9 o'clock a mile from where the body was seen and that Lim Mong Kim said he saw the body before 9 o'clock.

On the 17th the naked corpse of a girl was seen tied down to stakes in the same river a short distance from the place where the body was seen on the night of the 14th March. The corpse was recovered on the 19th March. There is no evidence that two naked corpses were found in this small creek in the same week, and the jury could properly find that the corpse identified on the 19th March as that of Lo Koh was the corpse seen by the prawn fisher on the night of the 14th.

Mr. Tan suggested to the jury that Kok Tek Tee was lying, but while the accused ascribed ill-will to a couple of inconclusive witnesses, he admitted that he never had a quarrel with Koh Tek Tee. This witness did not say there was a clock in the coffee shop. Even if there was, it does not follow that that clock and the fisherman's clock were accurate. Nor does Koh Tek Tee appear to have had any special ground for being impressed by the precise time.

We have it then that the accused, having seduced Loh Koh, was forced into an engagement to her: that he was seen with her on the night of the 14th, that her dead body was seen a mile away on the same night, and that he denies having seen her on the 14th and that he asserts he was several miles away from 7.30 p.m. that night.

On the 15th March the police received a letter in English purporting to be signed by the dead girl, explaining that she was being forced to marry Cheng "but I don't love him, and he too don't love me." "It was another man that I love." The letter alleged unhappiness in the house and proceeded "now I have already gone with Ahmat to other country" and to tell her father not to worry for her as she would come back to see him sooner or later. It was in evidence that Loh Koh could not read or write English.

This letter and a letter written by the accused at the dictation of the police and a poem admittedly in the accused's handwriting and found in his house were submitted to Mr. Oscar Wilson who has for many years given expert evidence on handwriting in the Courts of this Colony. Mr. Wilson's conclusion was that all three documents were written by the same person. As the jury accepted this evidence it follows that they found that accused wrote the letter professedly signed by Loh Koh.

Then on the 4th September 1937 while accused was in the Civil prison awaiting trial Mr. Reeves, a police Magistrate in Singapore received a letter dated the 2nd and professing to be signed by Ahmat, stating that he had killed the girl in Tampenis River because her father had cheated him and had promised him Loh Koh for wife and wanted to give her to Chen. This letter was on paper which was proved to have been supplied to the civil prison. This letter was also in the opinion of Mr. Wilson, written by the writer of Loh Koh's supposed letter.

The father never knew of deceased going with a man named Ahmat and swore that he never wished for her to marry him. The sister swore that deceased never went out with other men besides the accused, and emphatically denied that deceased was friendly with any one called Ahmat or was engaged to a man of that name.

The jury—a special jury—did not regard the evidence of time as being accurate and found that Loh Koh's dead body was seen a short time after the accused was seen with her; there was some motive for the accused murdering her; he commits a clumsy forgery to put the police off the track; he set up an *alibi* and this *alibi* was disbelieved.

I do not think the jury would have found otherwise than they did had the evidence which I regard as inadmissible been excluded.

The appeal is dismissed.

ROGER HALL, C.J. (F.M.S.) AND TERRELL, J.—We have had the opportunity of reading the judgment of the learned President of the Court with which we agree except on the question of the admissibility of the statements alleged to have been made by the deceased to her father Low Kim Song on the 5th March 1937 and to her sister Low Soo Ngim on the 14th March 1937.

The statement of the 5th March occurs in the evidence of Low Kim Song at p. 35 of the record and reads as follows:—

"Q. In consequence of what he (Su Peck) said to you, did you say anything to the deceased?

A. On the 3rd she refused to admit, on the 5th she admitted.

Q. Admitted what?

A. That she had slept the night at the accused's house.

Q. Why did she not admit on the 3rd when you first asked her?

A. Because the accused told her not to let me know about it. If I should come to know about it, then he would kill her."

The statement of the 14th March occurs in the evidence of Low Soo Ngim at p. 87 of the record and is as follows:—

"Q. Before she went out did she say where she was going or who she was going out with?

Judge: Did she make any statement?

Q. Did she make any statement at all?

A. Yes.

I said 'You are dressed in man's clothing: why do not you dress in Shanghai clothing She said Ah Cheng told her not to put on Shanghai clothing, but man's clothing in order not to let people know she was going out.

Q. Did she say any more?

Interpreter: She repeats the same thing. 'I said, why do not you put on Shanghai clothing and she said Cheng said not to put on, and not to let people know.

I said if you go out you must come back quickly and she said all right.

Q. Did she say with whom she was going out?

A. With Ah Cheng."

As regards the first statement, there can be no doubt that a threat uttered by the accused against the deceased shortly before the death of the deceased is relevant under section 14 of the Evidence Ordinance in showing the existence of a state of mind, and such evidence has frequently been given in criminal cases by witnesses who can depose that they heard the threat uttered, and can be cross-examined thereon. But in the present case the difficulty is not the relevancy of the evidence but the manner in which the prosecution sought to prove it, namely by hearsay evidence. A statement of a relevant fact by a person who is dead can only be proved if it comes under the provisions of section 32 (i) of the Evidence Ordinance. That section provides that such a statement is itself a relevant fact

"32. (1) When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

Such statements are relevant whether the person who made them was or was not at the time when they were made under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question."

Now as regards the alleged threat by the accused that he would kill the deceased if she told her father of her cohabitation with the accused, it is extremely doubtful whether such threat can be regarded as "any of the circumstances of the transaction which resulted in her death." After the father came to know that his daughter had cohabited with the accused, the situation was materially altered by the accused promising to marry the deceased and by the arrangement that a mutual friend (Su Peck) should draw up a proper agreement. It may well be that the promise itself, which the accused was unwilling to perform, supplied the motive for causing the death of the deceased, or there may have been some quite different motive. In either case the threat to kill her if she told her father would appear to be too remote and cannot properly be treated as one of the circumstances of the transaction resulting in her death, when other, and probably more cogent, motives had intervened. In our opinion, therefore, the statement of the 5th March was inadmissible. In view, however, of the very clear direction given to the jury to dismiss such statement from their minds we do not think that the fact of the evidence having been introduced ought to have affected the verdict in any way.

The second statement however seems to be in a different category. The statement, it admissible, is very material. The deceased is stated to have said (a) that she was going out with the accused, and (b) that it was the accused who told her to put on man's clothing. In view of the evidence of the body being found pegged down to the side of the creek, and tied with rope, the conclusion appears to be inevitable that the murder was premeditated, and that the necessary preparations had been made. If therefore the accused himself arranged for the deceased to go out with him and to wear man's clothes, presumably to avoid recognition, these would

undoubtedly appear to be circumstances of the transaction which resulted in the deceased's death, and the deceased's statements to that effect become relevant under the express provisions of section 32 (1).

We have been referred to the decision of the Johore Court of Appeal (Sproule and Burton, JJ.) in *Haji Salleh & anor.* v. *P.P.* (1931—2) F.M.S. L.R. p. 229, where a statement by the deceased made a month before his death to the effect that he was afraid that one of the accused might kill him, was held to be inadmissible. This decision may be justified on the same ground that we consider the statement of the 5th March inadmissible in this case, namely that it is too remote, and cannot properly be regarded as one of the circumstances of the transaction resulting in the death of the deceased. But we cannot agree with the dicta appearing in the judgment to the effect that a statement under section 32 (1) of the Evidence Ordinance is a dying declaration and must be confined to the injury and immediate circumstances of the cause of death, since section 32 (1) is not restricted in any such way. If the evidence that may be given under section 32 (i) is to be so confined it would be equivalent to adding to the sub-section a proviso to the following effect: "Provided that no such statement shall be admissible unless the deceased has already received the injury from which he subsequently died." That would be rewriting the subsection by introducing a qualification upon which the legislature is silent. (See *per* Lord Hewart L.C.J. in *Chaiutin* v. *Whitehead* 1938 A.E.R. Vol. 1, K.B.D. p. 159 at p. 162).

Under the English law a statement by a deceased person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, is only admissible, (a) where the person making such statement was in immediate expectation of death, and (b) in trials for homicide. Under section 32 (i) these restrictions have been abolished, and accordingly we do not think that any useful purpose will be served by considering the attempts of English Judges to admit, as part of the *res gestae*, statements made previous to the receipt of any injury by the deceased, such statements being clearly inadmissible as dying declarations. In any case the decisions on the subject appear to be irreconcilable, and afford no useful guide. (See for example, *Wainwright's* case, 13 Cox p. 171, and *Buckley's* case, at p. 293 of the same report). It appears to us that where the provisions of the statute law of the Colony are materially different from the corresponding English law on the subject, it is the duty of the Courts to interpret the local provisions as they stand and according to their natural meaning, and without reference to the very different rules which govern the law on the subject in England. As Lord Macmillan said in the case of *Commissioner of Stamps S.S.* v. *Oei Tjong Swan*, 1933 A.C. p. 378 at p. 387, "the best and safest guide to the intention of all legislation is afforded by what the legislature has itself said."

We would only remark that in referring to this statement in his summing up the learned trial Judge for some reason appeared to consider that part of the statement, namely that the deceased was going out with the accused, might be admissible, but directed the jury to reject the rest of the statement. He then warned them that they must also be satisfied that the statement was made at all. In our view the whole of the statement was admissible, but the accused was certainly not prejudiced by the manner in which the evidence was put to the jury in the summing up.

We agree, therefore, that this appeal should be dismissed.

Appeal dismissed.

[ORIGINAL CIVIL JURISDICTION]

HORNE, J.

March 16, 1938.

DATO KAMAT BIN HAJI SULEIMAN v. SAPAIN BINTE MOHAMED ZIN.

[MALACCA SUIT No. 67 of 1937]

Malacca Land Customary Rights Ordinance —Naning Custom.

When customary land is held under the Malacca Land Customary Rights Ordinance no lien or equitable charge can be created by deposit of the extract from the mukim register. The customary land holder can only charge his interest in the land in the manner provided by ss. 21 to 29 of the Ordinance.

Query. When land is held by the customary land holder under the Naning custom whether the land holder can give a charge to any person other than the female of the same suku.

ACTION.

Massey for the plaintiff.

Salt for the defendant.

The facts and arguments appear sufficiently from the judgment.

Cur. Ad. Vult.

HORNE, J.—The plaintiff claims damages for breach of an agreement in writing. It is admitted by Mr. Salt that if the agreement is enforceable or a severable part of it is enforceable then art. 95 of the Limitation Ordinance applies and consequently the plaintiff is not time-barred.